

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

LOWELL ENGBERG,

Appellant,

v.

SKAGIT COUNTY, and the State of  
Washington DEPARTMENT OF  
ECOLOGY,

Respondents.

SHB No. 90-38

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Lowell Engberg ("Engberg") has appealed Skagit County's ("County") partial denial of a shoreline conditional use permit and denial of a shoreline variance permit for fill on portions of his property adjoining Big Lake, east of Mount Vernon. The Department of Ecology ("DOE") was joined in this case because it might be affected by the proceedings.

The hearing on the merits was held on June 25-26, 1991 in Mount Vernon. Board Members participating were: Chair Judith A. Bendor, presiding, Harold S. Zimmerman, Annette McGee, Nancy Burnett, Emily Jackson, and Mark Erickson. Appellant Lowell Engberg was represented by Attorney Brock Stiles of STILES, STILES & STILES (Sedro Woolley). Respondent Skagit County was represented by John R. Moffat, Chief Civil Deputy, Skagit County Prosecuting Attorney (Mount Vernon). DOE was represented by Assistant Attorney General Kerry O'Hara (Lacey). Court reporters Robbie McCartney and D.J. Stults (Batholomew, Moughton

1 and Associates, Everett), took the proceedings. The Board and the  
2 parties went on a site visit the first day.

3 At the hearing, witnesses were sworn and testified. The  
4 witnesses were for appellant Engberg: William Avery Stiles III; for  
5 respondents County and DOE: Otto Graham, Andy McMillan, and Terry  
6 Prodan Hegy. Exhibits were admitted and examined. Counsel's  
7 contentions were heard and have been read.

8 From the foregoing, having reviewed the record, and having  
9 conferred, the Shorelines Hearings Board on July 15, 1991 orally ruled  
10 that the County's decision denying the permits should be affirmed.  
11 The following Board written decision confirms that ruling:

12 FINDINGS OF FACT

13 I

14 Lowell Engberg owns six acres of property at the southwest end of  
15 Big Lake, in Skagit County. He bought the property in 1988. This  
16 property is also known as "Lot 6".

17 The property is in an area designated Conservancy under the  
18 Skagit County Shoreline Management Master Program (SCSMMP).

19 The lot, prior to Engberg's activities, contained an extensive  
20 forested wetland which is connected with Big Lake. See Finding of  
21 Fact XIX, below.

22 Wetlands serve as critical habitat for wildlife and plants.  
23 Wetlands are a vital and diminishing resource in the State of  
24 Washington. This wetland stored and filtered water draining from the  
25 upland, prior to the waters' entry into Big Lake.

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II

Appellant Engberg constructed a dock on Big Lake and filled wetlands adjoining Big Lake, without first obtaining shoreline permits. This severely altered the wetland's topography and damaged its ability to function.

The County, on March 30, 1989, issued a written exemption for the dock, concluding a shoreline permit was not required. The dock, therefore, is not at issue in this appeal.

III

The County concluded the fill was not exempt from shoreline permit requirements. The County ultimately granted the substantial development permit and part of the conditional use permit to allow fill to remain outside of wetland areas, so Engberg and his family can camp and recreate. The use must be non-commercial.

The County denied part of the conditional use permit and the variance permit for fill in the wetland, requiring removal of the fill and the restoration of the wetland.

The Department of Ecology (DOE) agreed with the County's decision.

Lowell Engberg appealed the County's denial to the Shoreline Hearings Board, which became our SHB No. 90-38.

IV

On this property, the Ordinary High Water Mark ("OHWM") of Big

1 Lake is 10 feet landward of the Engberg dock.

2 Appellant's property has an upland area outside the wetland where  
3 he can park his vehicles and can camp.

4 An elevated boardwalk or similar means could provide access to  
5 his dock from non-wetland areas of his property.

6 There was no evidence the fill is needed for erosion control.

7 V

8 Appellant has alleged the County is estopped from denying the  
9 permits. See Conclusions of Law XVII-XIX, below. Therefore, a more  
10 extensive case history is provided than might otherwise be necessary.

11 Sometime in early October, 1988, Engberg began hand-clearing the  
12 site. He removed brush and some trees. He started to build a loop  
13 road. He dumped about 5 cubic yards of gravel and used a backhoe to  
14 place it. Engberg had not applied for any permits to do this work.

15 On October 10, 1988 a forester with the Washington Department of  
16 Natural Resources ("DNR") discovered the road construction, which  
17 stopped at the edge of a fish bearing stream. The stream had been  
18 partially diverted. He posted the property with a Stop Work Order  
19 because there was no Forest Practice Permit for the work. Mr. Engberg  
20 called the next day and the forester explained that an approved Forest  
21 Practice Permit was necessary before doing any work.

22 The DNR forester and a representative from the Washington  
23 Department of Wildlife (DOW) met with appellant on-site on  
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1 October 21, 1988. DNR reminded him of the need for a Forest Practices  
2 Permit, and DOW told him a Hydraulics Project approval was necessary  
3 before proceeding further. They suggested he contact the Skagit  
4 County Planning Department to make sure he met their requirements.

5 DOW required Engberg submit an environmental checklist in  
6 connection with the Hydraulics Project approval application.

7 In late 1988, at Engberg's request, Skagit County Shoreline  
8 Administrator Oscar Graham ("Graham") visited the site. Graham met  
9 with Engberg, and Mr. William Avery Stiles III, who is a friend of Mr.  
10 Engberg and was assisting him.

11 The site was very wet and muddy. Engberg said he had no  
12 immediate plans for development, but he projected in the future he  
13 would do some brush clearing, and might build a dock.

14 Engberg did not mention fill. Graham did not notice some fill  
15 had been placed on site.

16 Graham told him that no shoreline permit was needed for the brush  
17 clearing. He advised Engberg that dock development for non-commercial  
18 use could, under some circumstances, be exempted from a shoreline  
19 permit. He said that any substantial development within 200 feet of  
20 the Ordinary High Water Mark would involve a shoreline review.

## 21 VI

22 Over the next couple of months the DNR forester visited the  
23 site. He did not see any changes.

On February 7, 1989, Engberg filed a Forest Practices Permit application with DNR for the development of a loop road on the property. The DNR forester visited the site and discovered that more fill had been placed and a road constructed to within 100 feet of Big Lake. Engberg had also diverted a stream. Engberg had placed the fill to within 100 feet of the Lake. He had made assumptions about where the Ordinary High Water Mark line was without consulting anyone. He had not applied for a shoreline permit.

#### VII

The Department of Wildlife subsequently issued Engberg a criminal citation for doing a hydraulics project without obtaining Hydraulics Project approval, citing violation of RCW 75.20.100. A jury trial in Skagit County District Court resulted in Engberg's conviction. That matter is now on appeal.

#### VIII

On March 3, 1989, Graham received from DNR, Engberg's Forest Practices Permit application. He reviewed it. Graham made a site visit (March 7, 1989), saw the road construction, and the near completion of the dock. He also saw the fill. He sent a letter to DNR requesting denial of the Forest Practices Permit application until the shoreline permit process was completed.

The County issued a Notice and Order (March 8, 1989), directing Engberg to cease and desist activity on the property until the

1 shoreline permit application process was completed and permits were  
2 approved.

3 IX

4 Graham met with Engberg and Attorney Brock Stiles on site.  
5 During this site visit Graham discussed the dock's possible  
6 exemption. The County subsequently granted an exemption for the dock.

7 Graham also discussed the OHWM location at approximately the  
8 landward end of the dock. Arrangements were made for a Department of  
9 Ecology representative to visit the site to firmly establish the  
10 OHWM. DOE subsequently determined the OHWM was 10 to 12 feet landward  
11 of the dock.

12 The location of the OHWM was not disputed at the hearing.

13 X

14 On April 28, 1989, Engberg submitted his first application for a  
15 shoreline permit, and an environmental checklist. The application was  
16 for the development of a loop road and five campsites to be used for  
17 private recreational use. A shoreline variance permit was requested  
18 to allow for a road within 150 of the OHWM. The application stated  
19 that a "limited amount of fill (pit run)" would be used. Exh. R-6.

20 The environmental checklist which Engberg submitted was dated  
21 October 27, 1988, and was the same one submitted for the Hydraulics  
22 Project approval. The checklist stated: "No cuts or fills are  
23 proposed." Exh. R-7.

XI

Graham notified Engberg that an Unclassified Special Use Permit would be required for the project, pursuant to the Skagit County Zoning Code. On June 29, 1989, Engberg submitted a revised site plan reducing the number of campsites from five to one. The County subsequently withdrew the requirement for a Special Use Permit because the campsite was for personal use only.

XII

A public hearing for the shoreline permits was scheduled before the Skagit County Hearing Examiner for July 19, 1989. On July 10, the County received a telephone complaint that Engberg was continuing to place fill on the property. Graham conducted a site inspection that same day, and determined that Engberg had continued the project in violation of the Notice and Order issued to him on March 8, 1989.

Since the previous March, Engberg had placed an additional 1,000 cubic yards of fill on the property. He had heard about an opportunity to obtain fill, and so he had it hauled to the site and dumped.

On July 11, 1989, the County issued a second Notice and Order directing Engberg to cease all activity on site. Engberg was directed to submit another Shoreline Substantial Development/Conditional Use/Variance Permit application due to the change in project scope.

XIII

Engberg submitted a revised shoreline application and a revised



1 environmental checklist (July 18, 1989). The checklist stated the  
2 total fill would be approximately 800 cubic yards of pit run gravel.

3 Engberg also filed an administrative appeal (July 20, 1989),  
4 contesting the County determination that a new shoreline application  
5 was required.

6 XIV

7 On July 24, 1989, the Army Corps of Engineers visited the site.  
8 The Corps determined that the site contained wetlands, and the  
9 wetlands had been filled without a federal Section 404 permit. In a  
10 letter to the County, the Corps concluded the filling was considered a  
11 violation of the federal Clean Water Act.

12 XV

13 On August 17, 1989, a public hearing was held before the County  
14 Hearing Examiner to consider Engberg's administrative appeal on the  
15 requiring of a second shoreline application and revised environmental  
16 checklist. The Hearing Examiner issued a written order denying the  
17 appeal.

18 XVI

19 On September 25, 1989, the County Hearing Examiner Pro Tem held a  
20 public hearing on Engberg's revised application. The Hearing Examiner  
21 Pro Tem issued a decision (November 14, 1989), requiring removal of  
22 fill from the wetland area, ordering restoration of the property to  
23 its prior condition, and imposing a civil penalty of \$7,000 on  
24

1 Engberg, with \$5,500 suspended if he complied with the restoration  
2 order.

3 XVII

4 Engberg appealed this decision to the Skagit County Board of  
5 Commissioners. After the public hearing, (April 2, 1990), the Board  
6 of Commissioners adopted Resolution No. 12447, granting the  
7 substantial development permit and the conditional use permit in part,  
8 allowing existing fill in those areas not designated as wetland by the  
9 DOE or the Corps of Engineers. The permits were granted for the  
10 exclusive and non-commercial use by Engberg or his family members for  
11 camping and recreational purposes.

12 The County denied the shoreline variance permit for a road and  
13 parking area with fill within 150 feet of the OHWM, and denied the  
14 conditional use permit for fill in the wetlands. All fill within  
15 wetlands was ordered removed. Proposed fill for the fingers of the  
16 loop road to extend beyond the general circular area of the fill was,  
17 likewise, denied.

18 Engberg was directed to remove, at his own expense, the fill  
19 within 120 days of April 2, 1990. Within 45 days of removal, Engberg  
20 was required to replenish the area in natural vegetation, to allow it  
21 to return to its original state.

22 If Engberg did not comply with the Resolution, the County was  
23 directed to take the action necessary to complete the requirements and  
24

1 charge the expense of the same to Engberg. The fine imposed by the  
2 Hearing Examiner Pro Tem was rescinded.

3 XVIII

4 DOE approved the combined shoreline permits issued by the Skagit  
5 County Board of Commissioners in Resolution No. 12447.

6 Lowell Engberg appealed the County permit denials to the  
7 Shoreline Hearings Board.

8 XIX

9 Subsequently, in April 1990, a wetland expert with DOE did a  
10 detailed site inspection. He tried to sample the soil underlying the  
11 compact gravel fill, but was unable to do so. Instead, using accepted  
12 methodology, he chose locations at the edge of the fill. See Exh.  
13 R-23, attached to this opinion.

14 At these five locations he noted the vegetation and took soil  
15 samples. The samples were compared to standardized charts. Plots 1,  
16 2, 3, and 4 were shown to have hydric soils. Such soils have a  
17 characteristic color or mottling due to saturated conditions, because  
18 the iron in the soil has been chemically reduced due to lack of  
19 oxygen. At these four plots, the soils were saturated to within 18  
20 inches of the surface. Plant species which can survive in wetlands  
21 were found. At Plot 5, however, saturation was not found to within 18  
22 inches.

23 Skunk cabbage, a wetland plant, was seen growing out of the fill.  
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1 We find a forested wetland, also known as a swamp, exists and did  
2 exist on site. The wetland is and was in hydrological continuity with  
3 the lake. The boundaries of this wetland are shown in Exh. R-23.

4 XX

5 At "Lot 5", an adjoining lake-front property, fill had been  
6 placed. This was done without applying to the County for a shoreline  
7 permit or for an exemption. There was no evidence presented that the  
8 County was informed prior to filling and authorized that action.

9 XXI

10 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
11 adopted as such.

12 From these Findings of Fact, the Board makes these:

13 CONCLUSIONS OF LAW

14 I

15 The Board has jurisdiction over this appeal and these parties.  
16 Chapt. 90.58 RCW.

17 The Board determines the case de novo. Appellant Engberg has the  
18 burden of proof.

19 The Board reviews the proposed permits for consistency with the  
20 Shoreline Management Act (Chapter 90.58 RCW; "SMA"), implementing  
21 regulations, and the Skagit County Shoreline Management Master Program  
22 ("SCSMMP").  
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II

The SCSMMP defines Conservancy shoreline area as:

[...] area containing natural resources which can be used/managed on a multiple use basis without extensive alteration of topography. SCSMMP 6.04.4 a.

The objective of the Shoreline Conservancy designation is to:

ensure long-term wise use, enhancement, and protection of natural resources. SCSMMP 6.04.4.b.

III

A key SCSMMP Landfill policy states:

B. Location

(1) Landfills should not locate:

[...]

b. in estuaries, natural wetlands, and marshes. SCSMMP 7.06.1.B(1)(b).

A SCSMMP Recreation policy states:

wetlands should be identified, protected, and preserved for less intensive forms of recreation. SCSMMP 7.12.1.C(1).

IV

"Wetlands" or "wetland areas" are defined in the Shoreline Management Act at RCW 90.58.030(2)(f):

Those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous flood plane areas landward 200 feet from such floodways; and all marshes, bogs, swamps, and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the Department of Ecology. [...] See also, WAC 173-22-030(10).

1 The SCSMMP definition is the same, at Section 3.30, p. 3-24.

2  
3 V

4 WAC 173-22-030 provides:

5  
6 (1) "Associated wetlands" is synonymous with "wetlands"  
or "wetland areas";

7 [...]

8 (5) "Marshes, bogs, and swamps" are lands transitional  
9 between terrestrial and aquatic systems where  
saturation with water is the dominant factor  
10 determining plant and animal communities and soil  
development. For the purpose of this definition, these  
11 areas must have one or more of the following attributes:

(a) At least periodically, the land supports  
predominantly hydrophytes; and/or

12 (b) The substrate is predominantly undrained hydric  
soil.

13 Hydrophytes include those plants capable of growing in  
water or on a substrate that is at least periodically  
14 deficient in oxygen as a result of excessive water  
content. Hydric soils include those soils which are  
15 wet long enough to periodically produce anaerobic  
conditions, thereby influencing the growth of plants;  
16 [...]

17  
18 For lakes, such as Big Lake, wetland criteria are further provided  
19 in WAC 173-22-040:

20 (2) Lakes. The wetland area shall include:

21 (a) Those lands which extend landward 200 feet as  
measured on a horizontal plane from the ordinary high  
22 water mark; and

23 (b) Those marshes, bogs, and swamps which are in  
proximity to either influence or are influenced by  
24 the lake. This influence includes but is not limited  
to one or more of the following: periodic inundation  
25 or hydraulic continuity; [...]

VI

On this property, the OHWM for Big Lake is 10 feet landward of the Engberg dock. Those lands extending landward 200 feet from a designated OHWM are, by law, automatically "wetlands". RCW 90.58.030(2)(f); SCSMMP 3.03; WAC 173-22-030(1)); and WAC 173-22-040(2)(a). As a factual matter, the area is also a wetland and a swamp. See Finding of Fact XIX, above.

Part of the Engberg property more than 200 feet from the Big Lake OHWM is also a wetland, a swamp. Findings of Fact I and XIX; WAC 173-22-030(5). This wetland is associated with the Lake, and as such is also legally a wetland. RCW 90.58.030(2)(f); SCSMMP 3.03; WAC 173-22-030(1); and WAC 173-22-040(2)(b).

VII

Shoreline conditional use criteria at WAC 173-14-140, state in pertinent part:

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided the applicant can demonstrate all of the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the policies of the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other permitted uses within the area;

(d) That the proposed use will cause no unreasonably adverse effects to the shoreline environment in which it is to be located; and

1 (e) That the public interest suffers no  
2 substantial detrimental effect. [Emphasis  
3 added.]

4 The SCSMMP at 11.03. has similar provisions.

#### 5 VIII

6 The shoreline variance criteria, at WAC 173-14-150, provide in  
7 pertinent part:

8 The purpose of a variance permit is strictly limited  
9 to granting relief from specific bulk, dimensional or  
10 performance standards set forth in the applicable  
11 master program where there are extraordinary or  
unique circumstances relating to the property such  
that the strict implementation of the master program  
will impose unnecessary hardships on the applicant or  
thwart the policies set forth in RCW 90.58.020.

12 (1) Variance permits should be granted in a  
13 circumstance where denial of the permit would result  
14 in a thwarting of the policy enumerated in RCW  
90.58.020. In all instances extraordinary  
15 circumstances shall be shown and the public interest  
shall suffer no substantial detrimental effect.

16 (2) Variance permits for development that will be  
17 located landward of the ordinary high water mark  
18 (OHWM), as defined in RCW 90.58.030 (2)(b), except  
19 within those areas designated by the department as  
marshes, bogs, or swamps pursuant to chapter 173-22  
WAC, may be authorized provided the applicant can  
demonstrate all of the following:

20 [...]

21 (b) That the hardship described in 173-14-150(2)(a)  
22 is specifically related to the property, and is the  
23 result of unique conditions such as irregular lot  
24 shape, size, or natural features in the application  
25 of the master program, and not, for example, from  
26 deed restrictions or the applicant's own actions;



1 (c) That the design of the project is compatible  
2 with other permitted activities in the area and will  
3 not cause adverse affects to adjacent properties or  
4 the shoreline environment.

5 (d) That the requested variance does not constitute  
6 a grant of special privilege not enjoyed by the other  
7 properties in the area, and is the minimum necessary  
8 to afford relief; and

9 (e) That the public interest will suffer no  
10 substantial detrimental effect.

11 (3) Variance permits for development that will be  
12 located either waterward of the ordinary high water  
13 mark (OHWM) as defined in RCW 90.58.030(2)(b), or  
14 within marshes, bogs, or swamps as designated by the  
15 department under Chapter 173-22 WAC, may be  
16 authorized provided the applicant can demonstrate all  
17 of the following:

18 (a) That the strict application of the bulk,  
19 dimensional or performance standards set forth in the  
20 applicable master program precludes a reasonable use  
21 of the property not otherwise prohibited by the  
22 master program;

23 (b) That the proposal is consistent with the  
24 criteria established under (2)(b)-(e) of this  
25 section; and

26 (c) That the public rights of navigation and use of  
27 the shorelines will not be adversely affected.

(4) In the granting of all variance permits,  
consideration shall be given to the cumulative impact  
of additional requests for like actions in the area.  
For example if variances were granted to other  
developments in the area where similar circumstances  
exist the total of the variances shall also remain  
consistent with the policies of RCW 90.58.020 and  
shall not produce substantial adverse affects to the  
shoreline environment. [Emphasis added.]

The parallel SCSMMP provisions are at 10.03.

IX

Filling a wetland destroys the wetland, altering its topography and basic purpose.

Engberg has not met the criteria for a conditional use permit. The proposed use is not consistent with the policies of RCW 90.58.020 and the parallel provisions of the SCSMMP at 11.03:

The proposal will not preserve the natural character of the shoreline.

The proposal will result in long term harm over short term benefit.

The proposal will harm rather than protect the resources and ecology of the shoreline.

The proposal will cause unreasonably adverse effects to the shoreline environment by the removal of a functioning wetlands from a Conservancy shoreline area, causing the public substantial detrimental effect.

The proposal is not designed in a manner to minimize damage to the ecology and environment of the shoreline area. There is a practical alternative available which does not involve fill in a wetland.

X

The SCSMMP at Section 3.03, p. 3-23, defines "upland" as:  
those shoreline areas landward of OHWM except  
backshores, natural wetlands, and floodplains.

1 The SCSMMP regulation at 7.06.02.A(4)(b) prohibits landfills to  
2 create new uplands. A variance cannot be granted for a prohibited  
3 use. Gillett v. Snohomish County, et al., SHB No. 87-25.

4 XI

5 The proposal also does not meet the criteria for granting a  
6 variance as set forth in WAC 173-14-150(3) and parallel provisions in  
7 the SCSMMP at 10.03.2.

8 Strict application of the bulk, dimensional, or performance  
9 standards set forth in the master program does not preclude with a  
10 reasonable use of the property. WAC 173-14-150(3)(a). A non-wetland  
11 area exists which can be used for recreation. He could access the dock  
12 and the lake by building an elevated boardwalk or similar structure.

13 XII

14 Appellant Engberg has not proven he suffered a unique hardship  
15 from that of any other property owner with wetlands designated as  
16 Conservancy along Big Lake. WAC 173-14-150(3)(b) and (2)(b).  
17 Moreover, any hardship Engberg may have suffered is due to his own  
18 actions placing fill without the required permits. Id.

19 Engberg's project would result in adverse affects to the  
20 Conservancy Shoreline environment by destroying a functioning wetland.  
21 WAC 173-14-150(3)(b) and (2)(c).

22 Approval of the variance permit would constitute a granting of  
23 special privilege to Engberg in that similar requests within the  
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1 Conservancy shoreline area have been denied. The proposal is also not  
2 the minimum necessary to afford relief. WAC 173-14-150(2)(d).

3 The public interest would suffer substantial detrimental effect  
4 due to the destruction of wetlands adjacent to Big Lake.  
5 WAC 173-14-150(3)(b) and (2)(e).

6 XIII

7 If all those owning property in the Conservancy designated  
8 shoreline area of Big Lake were permitted to fill their wetland areas,  
9 the cumulative impact on the wetlands and the Conservancy Shorelines  
10 would be significant and adverse. WAC 173-14-150(4).

11 XV

12 The proposed project contravenes the SCSMMP Conservancy  
13 designation, (6.04.4.b), the Landfill Policy (7.06.1.B.1(b)), and the  
14 Recreation Policy (7.12.1.C.1).

15 XVI

16 In the Pre-hearing Order, which governs this proceeding, the  
17 following legal issue was also raised:

18 5. Does appellant have the right to simultaneously have  
19 an appeal before the SHB and at the same time submit a  
20 request for modification to the county for permits to  
allow that fill to remain which is more than 50' from  
the stream, while still removing the "fingers?"

21 At the time of the hearing no such permit modification request was  
22 submitted to the county, therefore this issue is moot.

XVII

Appellant contends that the County is estopped from denying the permits and therefore the permits should issue.

Estoppel against the government is disfavored, and should only be applied to prevent manifest injustice, where the application of the remedy does not interfere with proper discharge of governmental duties, violate public policy, and so forth. Finch v. Mathews, 74 Wn.2d. 161 (1968).

Appellant has the burden of proof and every element has to be proven by clear, cogent, and convincing evidence. Chemical Bank v. WPPSS, 102 Wn.2d 874, 905 (1984). The elements are: 1. an admission, statement or act inconsistent with the claim afterward asserted; 2. action by the other party relying on the first party's admission, statement or act; 3. injury to that relying party if the first party is allowed to contradict or repudiate their admission, statement, or act. Finch v. Mathews, supra, at p. 171 n. 3.

XVIII

Even if estoppel were proper against the County, issuance of the shoreline conditional use and variance permits would not be required. Under the Shoreline Management Act, the Department of Ecology has the statutory responsibility to affirmatively act on such permits. It is the Department's position the permits should be denied. Appellant did not assert estoppel against the Department. Moreover, appellant has

1 not presented a scintilla of evidence against the Department, let alone  
2 clear, cogent and convincing evidence.

3 XIX

4 In addition, appellant has failed to prove the first element of  
5 estoppel against the County, that it made a statement or did an act  
6 inconsistent with the claim later asserted. To the contrary,  
7 appellant's own actions, including the environmental checklist, at the  
8 least failed to disclose to the County the scope of the project.  
9 Appellant also disregarded the legal requirement to apply for and  
10 receive permits before altering the wetland by filling it.

11 Estoppel against the County is denied.

12 XX

13 Legal issue No. 6 in the Pre-Hearing Order is:

14 6. Did the County proceed in such a manner in terms of  
15 notice of the hearing examiner hearing that the County's  
decision should be overturned?

16 This issue has not been litigated. Appellant did not file a  
17 pre-hearing brief, nor was this issue raised in opening statement or  
18 closing argument.

19 No facts justifying this contention have been presented.

20 Moreover, the hearing before the Shoreline Hearings Board was de  
21 novo. Appellant had a full and fair opportunity to present his case.

22 XXI

23 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
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1 adopted as such.

2 From these Conclusions of Law, the Board enters the following:  
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ORDER

Skagit County's partial denial of a shoreline conditional use permit and denial of a shoreline variance permit to Lowell Engberg for fill and alterations in the shoreline wetlands shown in Exh. R-23, is AFFIRMED.

Existing fill material can remain in those areas which are not wetlands as shown on R-23. The shoreline substantial development permit and portions of the conditional use permit that were granted, are for Engberg's and his family members' exclusive and non-commercial use, for camping and recreational purposes.

All fill material placed by Engberg in the wetland shall be removed within 120 days of this order. Upon completion of such removal, appellant shall provide written notice to the County and the Department of Ecology.

Within 45 days of the removal, Engberg shall replenish the area in natural vegetation to allow it to return to its natural state.

The determination of whether all fill material has been removed and whether the area has been adequately replenished in natural vegetation shall be made jointly by the County and DOE. Appellant shall provide opportunity for inspections.



1 DONE this 4<sup>th</sup> day of September, 1991.

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4 SHORELINES HEARINGS BOARD

5 Judith A. Bendor  
6 JUDITH A. BENDOR, Presiding Member

7 Harold S. Zimmerman  
8 HAROLD S. ZIMMERMAN, Chairman

9 Annette S. McGee  
10 ANNETTE S. M<sup>C</sup>GEE, Member

11 Nancy Burnett  
12 NANCY BURNETT, Member

13 Emily Jackson  
14 EMILY JACKSON, Member

15 Mark Erickson  
16 MARK ERICKSON, Member

17 Attch.: Exh. R-23 Map

